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Reply Brief of Atty Genl & Richards for Appellees.

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In the Supreme Court of the United States.

October Term, 1897.

J. C. Anderson et al.
v.
The United States.
} No. 479.

BRIEF ON BEHALF OF UNITED STATES IN REPLY.

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OCTOBER TERM, 1897.

J. C. ANDERSON ET AL.
v.
THE UNITED STATES. } No. 479.

BRIEF ON BEHALF OF UNITED STATES IN REPLY.

I.

Counsel for appellants contend in their brief that the right of taxation is the test by which to determine whether or not the property has passed from under the exclusive control of the Federal Government and has become subject to control of the State.

Property transported into a State may become liable to pay taxes, together with all other property in the State, without having lost its character as interstate commerce. In the case of *Brown* v. *Houston* (114 U. S., 622), relied upon by counsel for appellants, this distinction is clearly pointed out. In that case the coal had reached

14025

its destination at New Orleans, and was there offered for sale. It was the end of its transportation, and, as said by this court, might remain there for a year or more. The supreme court of Louisiana, in its opinion, which was affirmed in this case, held distinctly that the clause in the Federal Constitution granting to Congress power to regulate commerce with foreign countries and among States had no immediate relation to or necessary connection with the taxing power of the State. That every tax upon property, it is true, might affect more or less the operations of commerce by diminishing the profits to be derived from the objects of commerce, but it does not for that reason amount to a regulation of commerce within the meaning of the Federal Constitution. If this tax had been levied by the State of Louisiana upon the coal because of and by reason of its having been brought from another State, it would clearly have been a discrimination, and have amounted to a regulation of interstate commerce.

This very point was decided in *Brown* v. *Maryland* (12 Wheat., 419), the opinion having been written by Chief Justice Marshall. The case involved the constitutionality of the act of Maryland requiring a license to be taken out by all importers of foreign articles, commodities, etc., and the Chief Justice very clearly points out that the jurisdiction of the National Government continues over articles introduced into a State even of their final destination until after a sale. He says:

> To what purpose should the power to allow importation be given unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient

> of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce.

Congress has a right not only to authorize importation, but to authorize the importer to sell. On this point Chief Justice Marshall, in the case above referred to, says:

> We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

And he adds further:

> It may be proper to add that we suppose the principles laid down in this case, to apply equally to importations from a sister State.

In the case of *Welton* v. *Missouri* (1 Otto, 275) this case involved the validity of an act of the legislature of Missouri requiring a license tax for peddlers. The statute defined a peddler to be, "whoever deals in the sale of goods, wares, or merchandise, * * * which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same." This act was held to be unconstitutional, because it was an interference with interstate commerce, and the court says:

> Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. * * *

> It will not be denied that that proportion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation.
>
> The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected, like it, to similar protection, and to no greater burdens. * * * It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.

In *Guy* v. *Baltimore* (100 U. S., 434) an ordinance of the city of Baltimore required vessels ladened with products of other States to pay for the use of wharves fees not exacted of home vessels. This ordinance was held to be an interference with interstate commerce, and the opinion draws the distinction between the right of taxation and the right of the State or city to regulate or interfere with commerce. In this case, as in the case of *Welton* v. *Missouri*, and *Brown* v. *Maryland*, above, the property had reached the State into which it was introduced, and, if the contention of counsel for appellants is true, the property in each instance would have been under the sole control of the States into which introduced. In the case of *Brown* v. *Houston*, above referred to, the court very clearly recognized the continuing

national power over the subject of commerce introduced into a State, even after it has reached its destination, and recognized that Congress had the power to relieve such property from taxation after reaching its destination. In the opinion the court says:

> When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State.

Surely Congress could make no regulation exempting such property from taxation upon any other constitutional ground than that it remained interstate commerce even after entering the State of its destination.

In the case of the *Pittsburgh and Southern Coal Company* v. *Bates* (156 U. S., 577), it was held that coal was subject to taxation in the State of Louisiana. This coal was still in the course of transportation. It had not yet reached its destination, to wit, the city of New Orleans. The vessels loaded with coal and in transit to New Orleans were stopped and moored in the Mississippi at Baton Rouge, so that the distinction between the right of a State to tax and the power to regulate interstate commerce is most clearly apparent, because this coal was still in transit, had not reached its destination, was temporarily stopped at Baton Rouge, and under the decision of this court in the case of *Cole* v. *Errol* (116 U. S., 517), was still clothed with the quality of interstate commerce and immunity from State regulations.

It therefore clearly appears that the right of taxation is not the test by which to determine whether or not the property has lost the character of interstate commerce. In truth, the attorney-general of Louisiana in the argument in this case contended that the taxation in question did not in any way infringe upon the constitutional provision relating to the regulation of commerce. His contention was that a tax on property that might be the subject of Congressional legislation is not a tax on commerce, and neither was the tax on property which has been the subject of such commerce, where it was taxed only as property and in common with all other property within the State. In its opinion in this last case, this court refers to the decision in the case of *Brown* v. *Houston* (114 U. S., 622) and states that the question was,

> whether the assessment of the tax upon the coal in question in the barges afloat amounted to any interference with or restriction upon the free introduction of the plaintiff's coal from the State of Pennsylvania to the State of Louisiana. In other words, whether the tax amounted to a regulation or restriction upon commerce of the States, or only to the exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject.

And the court further adds, referring to the case of *Brown* v. *Houston:*

> And the court further observed that it saw no conflict in that case * * * with the established

rule that a State can not pass a law which shall interfere with the unrestricted freedom of commerce between the States.

Until Congress shall have acted, the States may continue to regulate matters of local interest only, incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, freights, tolls, etc.

This distinction is apparent in the decision of this court in the case of *Pittsburgh and Southern Coal Company* v. *State of Louisiana* (156 U. S., 590). In this case was involved the constitutionality of the statute of Louisiana providing for the appointment of two coal and coke boat gaugers, and to fix their compensation to be paid by the owner.

In this case, as in the former, the coal was still on boats and barges on the Mississippi River, having been introduced from the State of Pennsylvania, and was still the subject of interstate commerce; but this court held that there was nothing in the provisions of the act of Louisiana which could properly be considered as a regulation of commerce in conflict with the power vested in Congress over the subject. It was recognized that the act might in a slight degree affect commerce, but not in such an extent or sense as to be properly designated as a regulation of commerce.

A distinction should be further drawn between property like this coal, which is shipped to a final destination as New Orleans and there is to be offered for sale, and the cattle is the case at bar, which are to remain only temporarily at the city of Kansas City. They are intended for immediate sale, and either immediate slaughter or

immediate transportation to the other markets. Delay of from one to two days would cause not only a loss in weights, but such a loss in grade and quality as render them unfit for the purposes for which the original shippers intended them. In the light of the foregoing opinions, would anyone contend that if the legislature of Missouri had passed an act requiring a license fee of $500 before anyone should be authorized to trade in cattle brought from other States and Territories, it would not be an attempted regulation of commerce, and therefore void; and surely what the State could not do in its sovereign capacity could not be legally done by this unincorporated association of traders.

In the case of *Scott* v. *Donald* (165 U. S., 58), it was held that the dispensary law of the State of South Carolina was a discrimination against goods brought into the State from other States. The statute of South Carolina did not purport to prohibit either the importation, manufacture, sale, or use of intoxicating liquors. On the contrary, liquors and wines are recognized as commodities which might be lawfully made, bought, and sold. Such liquors must, therefore, be deemed to be the subject of interstate commerce. Under the contention of appellants' counsel, the jurisdiction of the Federal Government over these liquors had ceased, because the liquors had reached their destination; but this court thought otherwise, and declared the law to be void in so far as it applied to liquors introduced from other States.

In the case of *Welton* v. *Missouri* (1 Otto, 275), above referred to, the statute of Missouri requiring a license tax

from a pedler was held to be void as an attempted regulation of interstate commerce, in view of the fact that a pedler was defined to be one dealing in the sale of goods not the growth, product, or manufacture of that State; yet in the case of *Ficklen* v. *Shelby County* (145 U. S., 1), this court held that the fee or license tax imposed by the statute of Tennessee upon Ficklen, who was a commercial agent or a merchandise broker having an office in the district, and whose business was to negotiate the sale of goods for nonresident merchants, was within the power of the State, and it was held that the legislature had the right to tax such dealers, professions, and occupations, and that such a tax was not a regulation of nor tax of interstate commerce when the party was engaged in selling goods located in other States. These two decisions of this court clearly recognize the distinction for which we contend.

In *Walling* v. *Michigan* (116 U. S., 446) the statute of Michigan imposed a tax upon persons who, not residing or having their principal place of business within the State, should engage there in the business of selling or soliciting the sale of liquors, but did not impose a similar tax upon persons selling or soliciting the sale of liquors manufactured within the State. This court held that this act was a regulation in restraint of commerce, and was void. The court says:

> A discriminating tax imposed by a State, operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is in effect a regulation in restraint of commerce among States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

In the case of *Brimmer* v. *Rebman* (138 U. S., 78) was considered a statute of Virginia which declared it to be unlawful to offer for sale within the limits of that State any meat from animals slaughtered 100 miles or more from the place at which it was offered for sale, unless it had been previously inspected and approved by local inspectors. Now, in this case the law did not require the inspection of fresh meats from animals slaughtered within 100 miles from the place in Virginia at which such meats were offered. If it had been a law requiring all meats to be inspected, then, under the decision of this court in the case of *Pittsburgh and Southern Coal Company* v. *Louisiana* (156 U. S., 590), it would have been a valid exercise of the police powers of the State. But in this case the act was held void as being in restraint of commerce, by virtue of its imposing a discriminating tax upon the products and industries of other States. Before the law could operate upon the meats affected they must have reached their destination, so that we see again that the right of taxation is not the test whether or not the property is interstate commerce.

In the case of *Bowman* v. *Railroad Company* (125 U. S., 465), the court held invalid a statute forbidding the importation of liquors. In this case the situs of the property was the State attempting to control it, but the court in its opinion necessarily held it to be still under the jurisdiction of the National Government. In the opinion in this case it is said:

> The very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which con-

sists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland* (12 Wheat., 419), as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States.

In the case of *Henderson Bridge Company* v. *The City of Henderson* (141 U. S., 679) it was held that the taxation of a bridge was not a regulation of commerce among the States, or the taxation of any agency of the Federal Government. The State was permitted to tax the bridge in order that property within its jurisdictional limits might pay its just proportion of the public revenues. By comparing the decision of this court in this case with its decision in the case of the *Covington Bridge Company* v. *Kentucky* (154 U. S., 204) we see the distinction clearly pointed out between the taxation of property and the regulation of interstate commerce.

In the case of *United States* v. *Jellico Mountain Coal and Coke Company* (46 Fed. Rep., 432) was involved the agreement entered into by the members of the Nashville Coal Exchange. In this case, the coal had reached its destination, and was there offered for sale. The members of this Nashville Coal Exchange adopted certain rules, and provided certain penalties to be inflicted upon those who should violate any of the rules. The court held that the agreement was in restraint of trade and commerce, and that the organization and the operation thereof under the rules was an agreement in restraint of trade and commerce, within the meaning of the anti-trust act of July 2, 1890.

So in the recent case of *United States* v. *Coal Dealers' Association of California*, in the circuit court of the United States for the ninth circuit in the northern district of California, in an opinion by Judge Morrow, which has not yet been printed, it is held that an association of dealers in coal in San Francisco was an unlawful combination and in restraint of trade, and said association was enjoined under the provisions of the act of July 2, 1890. In this case the coal was brought from British Columbia and the States of Oregon and Washington. The members of the association adopted certain rules and regulations fixing certain charges for the handling of the coal, certain weights, and regulating the trade therein, and establishing arbitrary rates for the coal. In that case the coal had reached San Francisco, its destination, and there was held by the members of the association for sale to the trade. It would be liable to taxation, as was held in the case of *Brown* v. *Houston*, and in the case of the *Pittsburg and Southern Coal Company* v. *Bates* (156 U. S., 577). Nevertheless, in this case it was held to still be interstate commerce and the association had unlawfully combined in restraint of trade, within the purview of the statute of July 2, 1890. It was contended very earnestly in that case, as in this, that the case presented by the bill was not within the law, and that the line dividing local from Federal authority excluded it from the jurisdiction of the Federal court.

Upon the power and right of the State to tax, this court, in the case of *Sherlock* v. *Alling* (93 U. S., 99), says:

> But upon an examination of the cases it will be found that the legislation adjudged invalid imposed

> a tax upon some instrument or subject of commerce, or exacted a license from parties engaged in commercial pursuits, * * * or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of taxation upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. * * * General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce.

And it may be said generally that legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of the citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon its citizens and property within its territory.

In *Lyng* v. *Michigan* (135 U. S., 161) it is said:

> We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it.

In *McCall* v. *California* (136 U. S., 104) the statute of California was held to be an attempted regulation of interstate commerce, and invalid, which required a license tax to be levied upon an agent of the railroad company,

having its principal place of business in Chicago, who was in the State of California soliciting passengers for his road. In its opinion this court quoted from the opinion in *Mobile* v. *Kimball* (102 U. S., 691), and says:

> Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.

And the court then quotes, with approval, section 378 from Pomeroy and his work on Constitutional Law, as follows, wherein he refers to the signification of the word "commerce:"

> It includes the fact of intercourse and of traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may, therefore, be regulated.

In the case of *Howe Machine Company* v. *Gage* (100 U. S., 676), there is involved the construction of the statute of Tennessee which required that a license fee or tax should be paid by all peddlers of sewing machines, without regard to the place of growth or produce of material, or manufacture. The plaintiff company was a corporation of the State of Connecticut, with an agent at Nashville, in the State of Tennessee, from which place he went into the various districts of the State to sell his machines. It was held that the fee could be properly demanded, and

the act was not in conflict with the Constitution of the United States as a regulation of commerce, as the fee or license tax was levied alike upon all parties within the State.

So, also, in the case of *Hinson* v. *Lott* (8 Wall., 148). Hinson was a merchant of Mobile, Ala. He had on hand liquors, some of which had been consigned to him by a resident of Ohio. Other liquors he had himself purchased in the State of Louisiana, and some he had imported. Under the laws of Alabama a tax of 50 cents per gallon was levied upon all liquors purchased by him, and also in reference to the liquors consigned to him by a citizen of Ohio, and this decision, when compared with the decisions in *Leisy* v. *Hardin*, *Bowman* v. *Railroad*, and *Scott* v. *Donald*, clearly points out the distinction between the right of a State to tax and the right of a State to regulate interstate commerce. The State, in its sovereign capacity, has the right to tax property situated in such State and under the protection of its laws.

II.

Counsel for appellants insist in their brief that appellants in their method of dealing with each other, under the rules of the association and yielding obedience thereto, are not interfering with interstate commerce, and have not formed an illegal association or combination, and refer, with great confidence, to the case of *Mogul Steamship Company* v. *McGregor* (23 Q. B. D., 544). This case of the *Mogul Steamship Company* v. *McGregor* was cited in argument in the Trans-Missouri

Freight Case, and the doctrine announced therein was repudiated by this court.

Upon an examination of all the authorities referred to by counsel for appellants in urging that this association is not an unlawful one, it will be found that the measure of the legality of the various agreements, combinations, and associations was one of reasonableness, and it was held that they were not unlawful if they were not unreasonable; but this distinction has been finally extinguished and destroyed by this court in its recent decision in the case of the Trans-Missouri Freight Association.

Counsel insist that the method of doing business by this association does not destroy competition. The fact, however, remains, as is abundantly shown by the record in this case, that before this organization was entered into there were more than 200 dealers in these cattle at the Kansas City stock yards, but since its organization there are 143 engaged in this trade, all of whom are members of this association. The remainder have been driven from the yards and forced out of this traffic. It has not destroyed competition between the members of the association, but it has absolutely prohibited any competition from any other source.

We respectfully submit that the decree in this case should be affirmed.

John K. Richards,
Solicitor-General.

John R. Walker,
United States Attorney.

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